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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1959

No. [redacted] 91

JAMES HENRY AUDETT,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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No.

JAMES HENRY AUDETT, *Petitioner,*

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UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

JUDGMENT SOUGHT TO BE REVIEWED.

Petitioner James Henry Audett respectfully petitions for writ of certiorari to review the judgments against him in the United States District Court, in and for the District of Idaho, Central Division and in the Ninth Circuit Court of Appeals. The United States District Court rendered no opinion. The opinion of the Ninth Circuit Court of Appeals is reported in ..... Fed. 2d ..... A copy is appended.

JURISDICTIONAL STATEMENT.

The judgment sought to be reviewed was entered on April 10, 1956. Petitioner filed his Notice of Appeal to the Ninth Circuit Court of Appeals on April 18, 1956. Time in which to appeal was extended by several orders. The Appeal was heard by the Ninth Circuit Court on March 2, 1959, and on March 31, 1959. That Court rendered its judgment modifying and affirming the judgment of the District Court. Petitioner filed a petition for rehearing before the Ninth Circuit Court of Appeals and rehearing was denied on May 4, 1959.

Jurisdiction to review the judgment in question is conferred upon this Court by 28 U.S.C., Section 347 (a).

QUESTIONS PRESENTED.

1. Whether United States Commissioners, paid officers and employees of the Government, may appear and defend in criminal proceedings in United States District Courts, a question of federal law which has not been, but should be decided by this Supreme Court.

2. Is a defendant accorded his Constitutional right to due process of the law when a United States Commissioner for the same United States District Court appears as defense counsel?

3. Whether the Supreme Court should now establish, in accordance with the increasing trend in State law, the salutary rule that one accused of crime cannot be convicted solely upon the uncorroborated testimony of purported accomplices.

4. Whether the general rule of law, that a lesser crime is merged with the aggravated one, and the particular decision of this Court in *Prince v. United States,* 352 U.S. 322, have not been misapplied, and decided incorrectly, by the Court of Appeals for the Ninth Circuit, in this action.

STATUTES INVOLVED.

28 U.S.C., Section 604 (a) (1) (6) (9);
28 U.S.C., Section 605;
28 U.S.C., Section 607;
28 U.S.C., Section 633 (8) (c);
18 U.S.C., Section 2113.

The text of these statutes is set forth in the appendix to this petition.

STATEMENT OF THE CASE.

On January 25, 1956, the Grand Jury for the United States District Court in and for the District of Idaho, Central Division presented an indictment against the petitioner charging him in Count I with entering the First National Bank of Cottonwood, Cottonwood, Idaho, a bank whose deposits are insured by federal deposit insurance, with intent to commit larceny and in Count II with taking and carrying away from said bank money, property and things of value, total value of which was $30,000.00 with intent to steal and purloin them. Petitioner pleaded Not Guilty and trial was had before a jury on April 9th and 10th

of 1956. The jury found the petitioner guilty on both counts. The Court sentenced the petitioner for a period of 20 years on Count I and 10 years on Count II, the sentences to run concurrently. The Court of Appeals modified the judgment of the District Court by striking therefrom the sentence imposed on Count II and as so modified affirmed the judgment.

Petitioner was convicted solely upon the uncorroborated evidence of two self-confessed accomplices, Donald Hall and Walter McClure. Both alleged accomplices plead guilty to bank robbery and Hall received a sentence of one hour in the custody of the Marshal while McClure received a sentence of six months to run concurrently with a theft sentence which he was then serving.

During the trial of the case and in all proceedings before the District Court petitioner was represented by attorneys Frank Meak and Dean E. Miller. The latter, who acted as petitioner's primary trial counsel, was United States Commissioner. Defendant knew that Mr. Miller was a United States Commissioner and signed a purported waiver of appearance.

ARGUMENT.

I.

A UNITED STATES COMMISSIONER CANNOT APPEAR BEFORE A UNITED STATES COURT AND ACT AS COUNSEL FOR A MAN ACCUSED OF CRIME.

For a U. S. Commissioner to represent an accused before a U. S. Court creates an irreconcilable conflict of interest and violates the United States Code.

The action of the U. S. Commissioner was sanctioned by both the United States District Court in and for the District of Idaho, Central Division and by the United States Court of Appeals in and for the Ninth Circuit.

Such action on the part of these United States Courts calls for the supervision of the highest United States Court, the Supreme Court of the United States.

Rules of the Supreme Court, Rule 19 (1) (b).

A United States Commissioner who sometimes sits as committing magistrate cannot at other times act as advocate for the accused. The roles of prosecutor, advocate for the accused and judge are irreconcilable. One man cannot jump from one to the other.

The United States Code prohibits officers and employees of the Administrative Office of the United States Courts from practicing law in the United States Courts.

28 U.S.C. Section 607.

A United States Commissioner is an officer or employee of the Administrative Office of the United States Courts.

Title 28 U.S.C., Part III, Chaps. 41 et seq. entitled "Court Officers and Employees."

It is apparent from 28 U.S.C. Section 605 that the Congress intended to include United States Commissioners among officers and employees of the Administrative Office. The duties of the director are defined to be, among others:

"(1) Supervise all administrative matters. . . ." (28 U.S.C. Section 604(a)(1).)

"(2) Determine and pay necessary office expenses of courts, judges, and those court officials whose expenses are by law allowable, *and the lawful fees of United States Commissioners.*" (28 U.S.C. Section 604(a)(6).) (Italics added.)

"(3) Purchase, exchange, transfer, distribute, and assign the custody of law books, equipment and supplies needed for the maintenance and operation of the courts and the Administrative Office *and the offices of the United States Commissioners.*" (28 U.S.C. Section 604(a)(9).) (Italics added.)

The opinion of the Court of Appeals (pages 4-5) relies upon 28 U.S.C. Section 633(8)(c) which provides for additional emoluments to United States Commissioners "who are required to devote full time to the performance of their duties of the office . . . and who do not engage in the practice of law" from which the Court concludes that Congress intended that United States Commissioners be allowed to practice law. But the fact that the United States Code contemplates that United States Commissioners may practice law does not mean that the Congress intended that United States Commissioners should practice law in the *Courts of the United States.* United States Commissioners may engage in law practice in the state and local Courts.

The Court of Appeals relied heavily in its opinion upon the fact that petitioner had waived his objection to the conflict created by Mr. Miller's being both his defense counsel and a United States Commissioner. It is petitioner's position that he was not able to waive

either the irreconcilable conflict of interest nor Mr. Miller's disqualification from practice in the United States Courts; that he could not, by a purported waiver, confer on Miller the privilege of practicing which is reserved by law to the Court itself.

II.

THE SUPREME COURT OF THE UNITED STATES SHOULD ESTABLISH THAT AN ACCUSED CANNOT BE CONVICTED OF A CRIME SOLELY UPON THE UNCORROBORATED TESTIMONY OF A PURPORTED ACCOMPLICE.

The present case is a classic example of the conviction of an accused on the entirely uncorroborated evidence of alleged accomplices. Witnesses Hall and McClure, by their own admissions, committed the burglary of the First National Bank of Cottonwood, Cottonwood, Idaho. They were both indicted, they both plead guilty, they were both convicted, and they were both waiting to be sentenced at the time that they testified in *U. S. v. Audett.* (59, 90.) Both witnesses testified that Audett conceived the plan of the burglary, solicited them to accompany him, and directed them in the accomplishment of the crime. But for the testimony of Hall and McClure, there was no other evidence to connect Audett to the crime. Thereafter, each received a "sentence"—Hall, *one hour,* in custody of the Marshal; McClure, **six** *months,* concurrent with a theft sentence; Petitioner, *Twenty Years.*

The rule which allows conviction upon uncorroborated evidence of purported accomplices is unjust. It

encourages perjury. It fails to provide adequate safeguards against the danger of conviction of innocent men.

Even an honest and upright man succumbs occasionally to the temptation to sacrifice another to help himself. A confessed criminal is proven unable to withstand temptation. It is not just to tempt him further. Pointing his finger at another can be exchanged for freedom or a reduced sentence.

Many states, recognizing the fact that testimony of accomplices is unusually unreliable have passed statutes which provide that an accused may not be convicted of a crime on the uncorroborated testimony of an alleged accomplice.

California Penal Code, Section 1111,

New York Code of Crim. Proc., Section 399,

are but two.

Some states, even in the absence of statute, have refused to allow convictions on the uncorroborated testimony of an alleged accomplice.

Coleman v. State (Md.), 121 Atl. 2d 254;

Witham v. State (Tenn.), 232 So.W. 2d 3.

The reason for the rule is well expressed in

Watson v. State, 117 Atl. 2d 549, 552:

> "It is a firmly established rule in this State that a person accused of a crime may not be convicted on the uncorroborated testimony of an accomplice. (Citations.) The reason for the rule requiring the testimony of an accomplice to be corroborated is that it is the testimony of a person admittedly contaminated with guilt, who ad-

> mits his participation in the crime for which he particularly blames the defendant, and it should be regarded with great suspicion and caution, because otherwise the life or liberty of an innocent person might be taken away by a witness who makes the accusation either to gratify his malice or to shield himself from punishment, or in the hope of receiving clemency by turning States' evidence. (Citations.)"

The Court of Appeals quotes Wigmore (Evidence, 3rd Edition, 1940, Section 2057) where Professor Wigmore argues in favor of the rule allowing conviction on uncorroborated evidence. His argument is that the promise of immunity is not "invariably" made and even if made, should not "invariably" cause distrust. However, the danger of perjured testimony is serious even though a promise of immunity is not made to every alleged accomplice and even though the promise of immunity does not always induce perjury. It is serious because the promise of immunity is frequently made and because the *temptation* to perjury is always present.

The Federal rule has been contrary to the rule of law being urged by petitioner. The Court of Appeals refused to adopt the rule urged by petitioner because of prior expressions of this Court approving the present Federal rule. It is up to the Supreme Court of the United States to establish as the law of the land the only fair and just rule of law in this regard.

III.

THE COURT OF APPEALS HAS MISAPPLIED THIS COURT'S DECISION IN PRINCE v. UNITED STATES.

Petitioner was charged by two counts on an indictment with the violation of two subsections of 18 U.S.C. Section 2113. Count I charged a violation of subsection (a), entry of a bank with intent to commit larceny. Count II charged a violation of subsection (b), grand larceny. He was convicted on both counts and sentenced on Count I to 20 years imprisonment and on Count II to 10 years. The Court of Appeals held the District Court in error in imposing two sentences for the one offense. The Court of Appeals further held that the sentence on Count II became merged in the sentence on Count I and modified the judgment by striking therefrom the sentence imposed on Count II. Petitioner filed a petition for rehearing in which he urged that the sentence on Count I be merged into the sentence on Count II, that the sentence on Count I should be stricken, and that only the sentence on Count II should stand. Petitioner's reason for such a contention is that Count II charged the more serious offense.

Count II charges the actual commission of a larceny and therefore defines an offense more serious than Count I which charges an entry with intent to commit larceny.

Many Courts have held that where defendant has committed but one offense and has been sentenced erroneously under more than one subsection of Sec-

tion 2113, that he may be sentenced only for the more aggravated crime.

Wilson v. United States, 145 Fed. 2d 734;
Wells v. Swope, 121 Fed. Supp. 718;
United States v. Harris, 97 Fed. Supp. 154;
United States v. Tarricone, 242 Fed. 2d 555;
United States v. Nirenberg, 242 Fed. 2d 632;
United States v. DiCanio, 245 Fed. 2d 713.

Prince v. United States, 352 U.S. 322, held that an entry with intent to commit robbery under 18 U.S.C. 2113 merged into the completed crime of robbery.

Prince v. United States (supra) further held that by 18 U.S.C. Section 2113(a), Congress intended to provide a penalty for attempted robbery just as severe as the penalty for a fully consummated robbery.

18 U.S.C. Section 2113(a) includes not only attempted robbery but also attempted larceny. Petitioner was charged with attempted larceny by Count I of the indictment. When petitioner was convicted of a completed larceny under Count II, the attempt merged into the completed crime.

Prince v. United States, 352 U.S. 322.

Therefore, the District Judge should have sentenced petitioner on Count II only which carried a maximum sentence of 10 years.

18 U.S.C. Section 2113.

The District Judge sentenced petitioner on both counts. The Court of Appeals while holding the sentence on both counts error, refused to hold that Count

I merged into Count II for the reason that the District Judge would have intended the 20 year sentence to stand. However, had the District Judge followed *Prince v. United States,* supra, and sentenced petitioner only upon the count charging the completed crime, he could have sentenced petitioner to 10 years only.

It is true that a violation of subsection (a) of Section 2113 carries a maximum penalty of 20 years. The reason is explained in *Prince v. United States,* supra, e.g. attempted robbery and robbery were intended by Congress to be punishable by the same maximum imprisonment. However, subsection (a) also defines attempted larceny. The crime of robbery carries a heavier penalty than the crime of larceny because it is a more serious crime.

Congress could not have intended the incongruous result that a larceny not consummated carries a penalty *double* the penalty incurred where a larceny is not consummated. As a matter of fact, the proper procedure to be followed by the Court of Appeals was to remand the case to the District Court for redetermination of the sentence within the maximum allowed by law.

Prince v. United States, 352 U.S. 322, 329;
Wilson v. United States, 145 Fed. 2d 734;
United States v. Harris, 97 Fed. Supp. 154.

SUMMARY OF ARGUMENT.

1. This Court must establish that a United States Commissioner cannot appear in a United States District Court as advocate for an accused.

2. This Court must establish that an accused cannot be convicted of a crime solely upon the uncorroborated testimony of purported accomplices.

3. This Court must clarify the meaning of its former decision, *Prince v. United States,* for the instruction of the several Courts of Appeals.

Dated, San Francisco, California,
June 1, 1959.

Respectfully submitted,

THOMAS M. JENKINS,
LESLIE GENE MACGOWAN,
Attorneys for Petitioner.

(Appendix Follows.)

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JAMES HENRY AUDETT,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

No. 15,929

Mar. 31, 1959

Appeal from the United States District Court for the District of Idaho, Central Division

Before POPE and JERTBERG, Circuit Judges
YANKWICH, District Judge

YANKWICH, District Judge:

On January 25, 1956, the Grand Jury for the United States District Court in and for the District of Idaho, Central Division, presented an Indictment against the appellant, JAMES HENRY AUDETT, charging him in Count I with attempting to enter and entering the First National Bank of Cottonwood, Cottonwood, Idaho, the deposits of which were insured by the Federal Deposit Insurance Corporation, with intent to commit the crime of larceny,—a violation of the federal law.[1] In Count II it was charged that, on the same day, he took and carried away from the First National Bank of Cottonwood, Cottonwood, Idaho, money, property and things of value, a total value of which was $30,000, which were alleged to belong and to be in the custody, care, control, management and possession of the bank, with the intent to steal and purloin them.[2]

[1] 18 U.S.C., § 2113(a).
[2] 18 U.S.C., § 2113(b).

On April 2, 1956, the appellant, appearing in court with one of his counsel, Dean E. Miller, was arraigned and entered his plea of not guilty. A trial was had before a jury on April 9 and 10 of the same year. On the latter date the jury found the appellant guilty on both counts. The Court, on the same day, sentenced the appellant to the custody of the Attorney General for a period of twenty years on Count I and ten years on Count II, the sentences to run concurrently. Additional facts will appear further on in the opinion.

This is on appeal from the Judgment.

I

THE RIGHT TO COUNSEL

The most fundamental issue raised in this case is that of improper representation by counsel in violation of the rights guaranteed by the Constitution of the United States. Both the due process clause[3] and the right to counsel[4] are invoked.

It has become axiomatic that, in the absence of intelligent waiver, the right to the assistance of counsel in criminal cases

> "is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty."[5]

And prejudice will be inferred from the denial of assistance of counsel.[6]

It is argued on behalf of the appellant that there was such denial here, because he was represented at the trial by the firm of Meek and Miller, consisting of Frank E. Meek and Dean E. Miller, and that Dean E. Miller was, at the time of such representation, disqualified from practicing before the United States District Court because he was a United States Commissioner for the District of Idaho, stationed at Caldwell, Idaho.

It is insisted that the United States Commissioner is an "officer or employee" of the administrative Office of the United

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[3]Constitution of the United States, Amendment V.

[4]Constitution of the United States, Amendment VI.

[5]Johnson v. Zerbst, 1938, 304 U.S. 458, 466-467.

[6]Glasser v. United States, 1942, 315 U.S. 60, 76.

States who is forbidden by the Judicial Code to practice law.[7] The argument is grounded upon the erroneous premise that, because Section 607 is contained in Part III of the Judicial Code which relates to "court officers and employees", the disqualification applies. But the fallacy of the argument lies in the fact that this part consists of nine chapters,[8] in which the Administrative Office and the United States Commissioners are treated and their duties defined *separately*. The Chapter also includes the entire judiciary from the Supreme Court down to the Customs Court. And if the designation of "officers and employees" in the title of these chapters were sufficient to make the commissioners subject to the limitations contained in the Code against the practice of law, then the appellation would be broad enough to encompass the entire judiciary, the clerks and the marshals. Yet it is significant that wherever the Congress has intended to prohibit the practice of law by officers of the United States *it has done so by specific enactment*, whether the enactment relate of judges of the courts,[9] marshals,[10] or court clerks.[11]

The fact that the Administrative Office passes on the lawful fees of the United States of commissioners[12] and furnishes them with offices, equipment and supplies[13] is not sufficient to make them "officers or employees" of the Administrative Office any more than the payment by the Administrative Office of expenses of the judges and of the cost of their books and equipment makes the judges of the various courts "officers and employees" of the Administrative Office.

The only reason for the separate inclusion of the phrases "and the lawful fees of United States commissioners"[14] and "the offices of the commissioners"[15] is because, with few exceptions, the commissioners receive, in lieu of compensation, the fees allowed by

[7] 28 U.S.C., § 607.
[8] 28 U.S.C., Chapters 41 to 57, covering § 601 to § 963.
[9] 28 U.S.C., § 454.
[10] 28 U.S.C., § 556.
[11] 28 U.S.C., § 955.
[12] 28 U.S.C., § 604(a)(6).
[13] 28 U.S.C., § 604(a)(9).
[14] 28 U.S.C., § 604(a)(6).
[15] 28 U.S.C., § 604(a)(9).

law. Commissioners, such as National Park Commissioners, who receive salaries fixed by the court which appoints them, are required to account for fees collected by them as "public monies".[16] All commissioners are inferior officers, adjuncts of the courts, possessing and exercising limited judicial powers of their own.[17] They are appointed by the courts.[18] Their fees and expenses are determined by statute.[19] As there is a maximum provided for the fees of each commissioner, he is required to account for them to the Clerk of the District Court in which he resides.[20]

The only direct limitation as to the qualifications of commissioners is that which provides that a person holding a civil or military office or employment under the United States or who is employed by any justice or judge of the United States

> "shall not at the same time hold the office of United States Commissioner".[21]

If we exclude the one provision relied on, the inapplicability of which has been fully demonstrated, there is no provision prohibiting commissioners from practicing law in the courts of the United States.[22] That this was the intention of the Congress is also shown by an amendment which became effective on September 2, 1957, and which specifically provides for certain additional emoluments to United States Commissioners

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[16] 28 U.S.C., § 634.

[17] Todd v. United States, 1895, 158 U.S. 278, 282; Grin v. Shine, 1902, 187 U.S. 181, 187; Go-Bart Importing Co. v. United States, 1931, 282 U.S. 344, 353-354; Freeman v. United States, 9 Cir., 1946, 160 F. 2d 69, 70; Swanson v. United States, 9 Cir., 1955, 224 F. 2d 795, 799. In a recent case the Supreme Court, referring, **arguendo**, to the persons referred to in §§ 601-963 of Title 28 of the Judicial Code, characterizes them as

> "the group of persons who serve as conventional court officers and are regularly treated as such in the law." (Cammer v. United States, 1956, 350 U.S. 399, 405)

[18] 28 U.S.C., § 607.

[19] 28 U.S.C., § 633.

[20] 28 U.S.C., § 636.

[21] 28 U.S.C., § 631(b). Significantly, this provision does not apply to part-time referees, nor to clerks or deputies of United States courts whose appointment as commissioner is approved by the Director of the Administrative Office of the United States.

[22] 28 U.S.C., § 607.

"who are required to devote full time to the performance of the duties of the office • • • and who do not engage in the practice of law".[23]

This warrants the conclusion that the Congress, by enacting this provision, recognized that commissioners not in this class, i.e., those who, *like Mr. Miller in this case, are part-time commissioners receiving fees for such services as they perform and retaining them as compensation, devoting part time only to their office,* are permitted to practice law in the courts of the United States. This accords with the policy obtaining in other instances, such as part-time referees in bankruptcy who are also permitted to practice law before the courts of the United States, except in bankruptcy cases, while full-time referees may not do so before any court.[24]

Granted that one who represents a person accused of crime should exercise his duty with highest fidelity, we cannot, in the light of the preceding analysis, see how a commissioner of the United States who, in certain instances, exercises the right of a committing magistrate which may be exercised by state judicial officers "empowered to commit persons charged with offenses against the laws of the United States",[25] thereby disqualifies himself from acting, *at the choice of a person accused of an offense against the United States,* as his attorney, in the trial of a criminal case with the initiation of which he has had nothing to do. At best, the right to a preliminary examination may be waived.[26] The waiver does not involve the surrender of any constitutional right.[27] And while the hearing before a commissioner is a step in the institution of a criminal proceeding, it should not act as a Bill of Attainder against the commissioner so as to deny him the right to act as counsel for a defendant before the courts of the United States. The warning of a great Justice comes to mind:

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[23]28 U.S.C., § 633(8)(c); Pub. L. 85-276, Sec. 1, 2, 71 Stat. 600.

[24]Bankruptcy Act of 1938, § 39(b)(2), 11 U.S.C., § 67(b)(2), as amended June 28, 1946, c. 512, Sec. 5, 60 Stat. 326; July 7, 1952, c. 579, § 12, 66 Stat. 424.

[25]Rule 5(a), Federal Rules of Criminal Procedure.

[26]Rule 5(c), Federal Rules of Criminal Procedure.

[27]Giordenello v. United States, 1958, 357 U.S. 480. See, United States v. Walker, 2 Cir., 1952, 197 F. 2d 287.

"Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."[28]

II

WAIVER

Because the contention here made as to the status of commissioners, *if correct*, would affect many part-time commissioners in this Circuit, we have discussed it with great fullness. We are led to the inevitable conclusion that there is no disqualification for a United States Commissioner to represent a person accused of crime in the trial of a criminal case before a court of the United States, in a matter with which he was not connected as a commissioner.

In the case before us there is the added fact that after the appellant employed the firm of which Mr. Dean E. Miller, the United States Commissioner, was a partner, the question of possible disqualification was fully discussed with the appellant. There is in the record a letter dated March 27, 1956, written by the senior partner of the firm which indicates that the matter had been discussed fully with the United States Attorney and, informally, with the Judge of the Court by counsel for the appellant. Appended to it was a waiver. The letter and waiver are reproduced in the margin.[29]

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[28]Mr. Justice Cardozo in Snyder v. Massachusetts, 1934, 291 U.S. 97, 122.

[29]"March 27, 1956

Sherman F. Furey, Jr.,
United States Attorney,
District of Idaho, Boise, Idaho

Re: United States vs. James Henry Audett

Dear Sir:

As you know, I discussed recently with you the fact that my partner, Dean E. Miller, is a duly appointed, qualified and acting United States Commissioner, my purpose being to ascertain whether in your opinion it would be necessary for him to resign as such because of this firm's

The experienced trial judge, not content with the written waiver, which was filed in court on March 29, 1956, brought up the matter in open court while the jury was being selected. The following proceedings occurred:

"The Court: Before we continue to select a jury for this case, I have a matter to take up here.

"The Defendant being present, it has come to the attention of the Court that it might be well to see if the Defendant is fully advised that Mr. Miller, who is of counsel for the Defendant, is a Commissioner,—a United States Commissioner for the District of Idaho. You are, of course, aware of that?

"The Defendant: Yes, sir.

"The Court: And you, Mr. District Attorney, are aware of that?

"Mr. Furey: Yes, Your Honor.

"The Court: Do you waive any question as to his appearing here as counsel for you, Mr. Audett?

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employment by James Henry Audett to represent him in his defense against the indictment filed against him, and upon which he is to be arraigned on April 2nd, in the Federal Court Room at Moscow, Idaho.

I also informally discussed this matter with Judge Clark.

This is to advise you that our client, James Henry Audett, has been fully advised of this matter and of the fact that Mr. Miller is a United States Commissioner, and as a matter of fact, will be asked to read this letter before it is mailed to you, and to endorse thereon his waiver of any objection he might have to the fact Dean is a United States Commissioner. He is further being advised that at the time of his arraignment he should make an oral waiver of any objection he might have in the matters.

Yours very truly,
MEEK & MILLER
/S/ By FRANK E. MEEK,
Frank E. Meek.

FEM:lr

Waiver

I, James Henry Audett, hereby certify that I have read the above and foregoing letter, that I have been fully advised that Dean E. Miller is a United States Commissioner, and hereby expressly waive any objection that I might have to his being such in the matter of being one of my attorneys in the above referred to matter.

/s/ JAMES HENRY AUDETT

(Endorsed): Filed March 29, 1956."

"The Defendant: Yes, sir.
"The Court: Now, you may proceed."

The appellant here is not a stranger to the law. There is a record of his conviction of another bank robbery in the records of the Eighth Circuit.[30] And there is evidence in the record that he had written a book called "THE RAP SHEET" relating to his various experiences. So, despite the argument that he is of Indian extraction, we are not confronted here with an illiterate person who can rightly claim that he may not have understood the proceedings and the scope of the waiver.

Waivers of the most fundamental rights, such as waiver of the right to the assistance of counsel,[31] trial by jury,[32] and consent to trial by a jury of less than twelve,[33] are permissible. And we see no reason why, assuming that an unconscious conflict of interest might exist between the duty of one of his attorneys towards him, and that attorney's duty arising from his employment as a United States Commissioner, the appellant, when apprised of the fact, having chosen not only to retain the commissioner as one of his counsel, but having both in writing and orally in open court waived any question that might arise from such conflict, can be heard to complain.

If a situation existed such as confronted this Court recently,[34]

[30]Audett v. United States, 8 Cir., 1942, 132 F. 2d 528.

[31]Johnson v. Zerbst, supra Note 5; Glasser v. United States, supra Note 6.

[32]Rule 23(c), Federal Rules of Criminal Procedure. See, Schick v. United States, 1904, 195 U.S. 65, 71-72; Adams v. United States, 1942, 317 U.S. 269, 275-278; Echert v. United States, 8 Cir., 1951, 188 F. 2d 336, 339; United States v. Cantor, 2 Cir., 1954, 217 F. 2d 536, 538; Mason v. United States, 10 Cir., 1957, 250 F. 2d 704, 705.

[33]Patton v. United States, 1930, 281 U.S. 276, 312-313; Rule 23(b), Federal Rules of Criminal Procedure.

[34]Kyle v. United States, 9 Cir., No. 16,144, decided February 16, 1959. "An accused should never have counsel not of his choice forced upon him." (Duke v. United States, 8 Cir., 1958, 255 F. 2d 721, 724)

By the same token, having chosen his counsel, he should not be allowed to claim deprivation of due process through inadequate representation, unless the record warrants the conclusion that there was gross and deliberate misrepresentation.

where a conflict between two defendants represented by the same attorney appeared, resulting in possible detriment to one of them, the problem of adequate representation might be inquired into. But no such situation confronts us here. The defendant was tried separately. Both members of the law firm employed fully protected the rights of the defendant. Every witness was cross-examined. The examination of one of the accomplices, Walter Clyde McClure, by Mr. Miller was quite extensive. It covers twelve pages in the printed record. The plea of guilty to the bank robbery and the fact that he is an inmate of a State prison were brought out. The cross-examination of the other accomplice, Donald Wayne Hall, by Mr. Frank E. Meek was even more extensive. It covers twenty-nine pages, in which his previous conviction was stressed.

At the conclusion of the Government's case, Mr. Miller made a motion to acquit. Significantly, the motion was broad enough to cover practically *all* the points made in this appeal, excepting only the question of disqualification. It is reproduced in the margin.[35]

The appellant did not take the stand. No other witnesses were offered on his behalf. The record does not indicate whether this was upon the advice of his counsel or not. Assuming that it was, we can draw no inference of dereliction of duty, absent a competent showing that it was anything other than the attorney's best judgment in the circumstances. No exceptions were taken to the instructions by either side. A reading of the instructions

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[35] "MR. MILLER: If the Court please, comes now the defendant and moves the Court for Judgment of acquittal on the grounds and for the reasons that at the close of the evidence on behalf of the Government the evidence is insufficient to sustain conviction of the offenses charged in the Indictment, and particularly that there has been no evidence of any real character tending to connect the defendant with the commission of this crime other than the testimony of accomplices; that the testimony of the accomplices, while we realize it is sufficient to sustain a conviction under the rules of this court, in this particular instance it is between the two of them, there is no corroboration of any nature tending to connect the defendant with the commission of this crime, and there is no corroboration of the testimony of the accomplices. For this reason the defendant moves the Court for judgment of acquittal.

"THE COURT: The Motion will be denied."

convinces us that the Court advised the jury fully as to the law of the case, even giving the cautionary instructions as to the testimony of an accomplice, which is to be discussed further on in the opinion.

Claims of inadequate representation are frequent. But on close examination they will be found, in most instances, to be merely a defendant's dissatisfaction, after conviction, with the manner in which his case was handled. The answer to a contention of this character was given by the Court of Appeals for the Tenth Circuit, in these words:

> "But, one who appears before the court with counsel employed for his defense is not deprived of his constitutional right to the assistance of counsel merely because in retrospection he concludes that such representation did not meet his standards of effectiveness."[2]

There is no showing that witnesses existed who could have placed the appellant elsewhere at the time when the two accomplices placed him at the bank when the offense was committed, or that any other witnesses existed that would have contradicted the consistent and unshaken story of the two accomplices, which the physical facts testified to by others verify, as to the commission of the offenses and the appellant's participation in it. That, in the view of present counsel, the cross-examination was not have been "searching" enough is not sufficient to cast discredit on the competence of the attorneys who represented the appellant at the trial.

[2] Moss v. Hunter, 10 Cir., 1948, 167 F. 2d 682, 684. See, Merritt v. Hunter, 10 Cir., 1948, 170 F. 2d 739, 741; Kinney v. United States, 10 Cir., 1949, 177 F. 2d 895, 897. To use the oft quoted language of Judge Wilbur of this court, in Ex parte Hanmosch, 9 Cir., 1936, 83 F. 2d 558, 559, "a defendant

> "having been represented at the trial of his case before a duly constituted court and jury by an attorney of his own selection, cannot complain that he has been deprived of his constitutional right to be represented by counsel because the attorney so selected was, as he claims, unskillful or incompetent in the handling of the case."

And see the language of Judge Minton in United States v. Rader, 7 Cir., 1949, 176 F. 2d 579, 586, and the more recent language of Chief Judge Biggs in United States v. Handy, 3 Cir., 1953, 205 F. 2d 42, 43, 44, 45, and see Anderson v. Bannon, 6 Cir., 1958, 250 F. 2d 654, 655.

After all, there are few trial lawyers who, on examining the record of a trial critically, would not say that "they might have done better". But such surmises would not warrant this Court in branding the defense in this case as so inadequate as to amount to denial of the right to counsel.

III

THE SUFFICIENCY OF THE EVIDENCE

There remains to consider the sufficiency of the evidence in the record to sustain the conviction. So doing we bear in mind that our function is not to weigh and consider the contradictions and inconsistencies which counsel for the appellant finds in the testimony of the two accomplices in connecting the appellant with the robbery. Our province is to determine whether there is substantial evidence to support the verdict of the jury taking the view of the evidence most favorable to the Government. Ours is not the function to determine whether, on the record, reasonable doubt could or would exist.[8] The function of the Court of Appeals in a case of this character was summed up with brevity by the Supreme Court, in these words:

> "It is not for us to weigh the evidence or to determine the credibility of witnesses. The verdict of a jury must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it."[9]

The testimony may be given in brief summary. The character of the bank as a national depository on the day it was entered and the money and things of a total value of $30,000 taken is not in dispute.

The appellant and Hall met at Portland, Oregon in the latter part of September 1958. At a small town adjoining Portland—Gladstone, Oregon—appellant asked Hall how he was doing and if he was making any money or if he was hard up for money.

[8] Hunt v. United States, 9 Cir., 1936, 81 F. 2d 816, 827-828; Banks v. United States, 9 Cir., 1945, 147 F. 2d 638, 639; Stillman v. United States, 9 Cir., 1949, 177 F. 2d 607, 616; Woodard Laboratories, Inc. v. United States, 9 Cir., 1952, 198 F. 2d 995, 998; Las Vegas Merchant Plumbers Ass'n. v. United States, 9 Cir., 1954, 210 F. 2d 732, 742-743.

[9] Glasser v. United States, supra Note 6, p. 80.

to which he answered "he was pretty well broke", whereupon appellant asked him if he wished to "accompany him on a burglary, to burglarize a bank". Hall declined the invitation. He saw him again in the middle of October.

In the meantime, Hall had talked to Walter McClure, the other accomplice, at whose house he was staying. About October 24, the two went to the appellant and told him that they accepted the proposition and would go with him. Appellant asked them to pick up some tools, which they did. These consisted of a bar

> "with a pry bar on one end and a point on the other, something like a marlin spike on the other end, and some wood drills, bits, and two drift punches approximately twelve inches long by about three-sixteenths, and a coil of rope and a six pound hammer."

On October 26, Hall and McClure met the appellant, who was in a Studebaker car from which they transferred some tools to McClure's car. They followed the appellant three or four blocks, where he left his car and joined them. They drove to Colton on the Washington side of the Columbia River where they attempted to burglarize a bank but were unsuccessful. They then drove to Lewiston, Idaho. Hall and McClure used assumed names in registering at a hotel. The appellant registered in his own name. The next day, after eating breakfast, they drove to Cottonwood, Idaho. After looking over the Cottonwood bank they drove to Arco, Idaho. On October 28, 1953, they returned to Cottonwood and "cased" the bank. After darkness, they entered the Cottonwood bank by breaking a skylight and lowering a rope coil through the opening. Hall slid down the rope, opened the door to the rear alley allowing McClure and the appellant to enter. The bricks from the safe were removed. Appellant and McClure entered the vault and returned with a "little leather secretary" and silver and gold coins and other property removed from the safe deposit boxes, amounting to the total value of $30,000. The plunder was later divided equally between the three participants.

Appellant participated in the planning of the entering of the safe and the removal of the property. The three left the building through the back door leaving the tools and the rope at the place of the burglary. All three were later arrested.

Part of the money and property was recovered from Hall and McClure. All were separately indicted on charges of violating the Bank Robbery Statute.[39] Hall and McClure pleaded guilty and testified for the Government at the trial.

Counsel for the appellant concede that Hall and McClure agree very closely as to the manner in which the crime was committed, but point to certain inconsistencies in their narrative as to the appellant's connection with the crime.

As already pointed out, it was for the jury to resolve these and other inconsistencies beyond a reasonable doubt. They evidently did so by finding the appellant guilty. And ours is not the function to determine whether, in view of these inconsistencies, a reasonable doubt could or did exist. The jury's verdict determined this question.[40]

The Court gave to the jury a cautionary instruction which left it to them to determine whether they would convict on the uncorroborated testimony of the accomplices. The full instruction is reproduced in the margin.[41] No exception was taken to this

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[39]18 U.S.C., § 2113(a) and (b).

[40]See cases cited in Note 36.

[41]"An accomplice is defined to be one concerned with others in the commission of a crime. It is a settled rule in this country that even accomplices in the commission of a crime are competent witnesses, and that the Government has the right to admit their testimony and that of the jury to consider it. The testimony of accomplices, however, is to be received with caution and weighed with great care, and while it is true that a jury may convict on such testimony alone, yet the jury should not rely on it unsupported for a conviction, unless it produces in their minds a positive conviction of its truth. If it does, the jury should act upon it.

"You are instructed, therefore, that you are to receive the testimony of an accomplice with caution and examine it with care. This does not mean, however, that you are to arbitrarily reject it. It only means that you are to examine it with care; and if, having done so, you believe its truth, then you are to give it the same credence as the testimony of any other witness. In considering the evidence, you should consider his appearance, his manner of testifying, the probability, or improbability of the facts to which he has testified; his motives, or interest in the

instruction. It is now argued that it should have been more elaborate and should have emphasized the motive of the accomplices in securing "freedom or a reduced sentence" in exchange for this testimony. In view of the absence of a request for additional instructions no error can be predicated on refusal of instructions or error asserted in the instructions given.[42] Of course, in rare cases the court may notice plain error.[43]

That situation does not exist here, for the instruction given covered fully the law as applied in this circuit.[44] In truth, appellant's counsel are asking us to adopt the rule, which obtains in certain states, that conviction cannot be obtained on the uncorroborated testimony of an accomplice. The short answer is that the federal doctrine which permits such conviction is sound and consonant with the rule obtaining in the law of evidence that the testimony of one witness, if believed, is sufficient to

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case; whether or not his evidence is consistent with itself and with the other evidence or admitted facts of the case, and if, having considered his testimony in the light of all these rules you believe that he has told the truth, then I instruct you that the defendant can be convicted on this evidence alone, if that evidence convinces you that this defendant is guilty beyond a reasonable doubt."

[42]Rule 30, Federal Rules of Criminal Procedure.

[43]Rule 52(b), Federal Rules of Criminal Procedure; Lash v. United States, 1 Cir., 1955, 221 F. 2d 237, 240; Herzog v. United States, 9 Cir., 1956, 235 F. 2d 664, 666-668; Smith v. United States, 6 Cir., 1956, 230 F. 2d 935, 939; United States v. Private Brands, Inc., 2 Cir., 1957, 250 F. 2d 554, 557-558. The power should be used sparingly and confined to cases in which miscarriage of justice would, otherwise, result: Bell v. United States, 8 Cir., 1958, 251 F. 2d 490, 494; United States v. Vasen, 7 Cir., 1955, 222 F. 2d 3, 5-6; Horton v. United States, 9 Cir., 1949, 173 F. 2d 138, 141; and see, Smith v. United States, 9 Cir., 1949, 173 F. 2d 181, 184.

[44]Craig v. United States, supra Note 36. Moreover, the entire charge in the case conformed to the test laid down by this court for instructions in criminal cases:

> "In a criminal case the court must instruct on all essential questions of law involved, whether or not it is requested to do so." (Samuel v. United States, 9 Cir., 1948, 169 F. 2d 787, 792)

prove a fact,[45] is approved by the Supreme Court and is firmly established in the law of this and other circuits.[46]

The cautionary instruction, although desirable, is not "an absolute necessity."[47]

The rule requiring corroboration of accomplices is of continental European origin. In the English system questions concerning it did not appear until the end of the Seventeenth Century. Of its purport, Wigmore writes:

> "As a matter of common law, then, the doctrine was universally understood (except by one or two Courts) as amounting to no rule of evidence, but merely to a *counsel of caution* given by the judge to the jury. It followed that the jury might or might not regard the caution by acquitting upon an uncorroborated accomplice's testimony; that they alone were to determine whether corroboration existed and was sufficient; and that the trial judge's omission of the caution was of itself not a ground for a new trial, being a

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[45] Wigmore on Evidence, 3rd Ed., 1940, § 2034. The rule requiring multiple witnesses in treason, perjury and the like, is a departure from this doctrine based on historical and other considerations. So also is the rule requiring corroboration. Wigmore, op. cit., § 2032.

[46] Holmgren v. United States, 1910, 217 U.S. 509, 523-524; Caminetti v. United States, 1917, 242 U.S. 470, 495; Kuhn v. United States, 9 Cir., 1928, 24 F. 2d 910, 914; Craig v. United States, supra Note 36, p. 827; Pina v. United States, 9 Cir., 1948, 165 F. 2d 890, 891-892; Todorow v. United States, 9 Cir., 1949, 173 F. 2d 439, 444; Doherty v. United States, 9 Cir., 1956, 230 F. 2d 605. And see, Lyles v. United States, 5 Cir., 1957, 249 F. 2d 744, which contains an interesting comment on this rule, especially as applied by this court.

[47] In Pina v. United States, supra Note 45, this court approved the following language of the Court of Appeals for the Second Circuit as to the need for such instruction:

> "The warning is never an absolute necessity. It is usually desirable to give it; in close cases it may turn the scale; but it at most is merely a part of the general conduct of the trial, over which the judge's powers are discretionary, like his control over cross-examination, or his comments on the evidence. If he thinks it unnecessary —at least when, as here, the guilt is plain—he may properly refuse to give it. Such we understand to be the upshot of the decisions." (United States v. Becker 2 Cir., 1933, 62 F. 2d 1007, 1009)

matter solely for the trial judge's discretion."[48] (Emphasis theirs)

He condemns the reasons behind a contrary policy. The implication that an accomplice testifying for the Government *must have* relied on promise, express or implied, of immunity or leniency,—an argument which counsel in this case have stressed, he rejects by stating:

> "The promise of immunity, then, being the essential element of distrust, but not being invariably made, no invariable rule should be fixed as though it had been made. Moreover, if made, its influence must vary infinitely with the nature of the charge and the personality of the accomplice. *Finally, credibility is a matter of elusive variety, and it is impossible and anachronistic to determine in advance that, with or without promise, a given man's story must be distrusted.*"[49] (Emphasis added)

So there are ample reasons, historical, psychological and other, for not changing a cautionary rule into a rigid and dogmatic method of proof for ordinary criminal offenses. The exception in treason[50] or perjury[51] should not obtain in the trial of the ordinary criminal case. In the case of treason the provision is embodied in the Constitution.[52] In the case of perjury the rule "is deeply rooted in past centuries."[53]

Any change of the rule should be made by Congressional legislation applicable to all federal courts, and not by judicial fiat, which, unless it be that of the Supreme Court, would affect certain federal courts only.

What has just been said would require the affirmance of the judgment in its entirety. There is one fact, however, of which

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[48] Wigmore, op. cit., § 2056.

[49] Wigmore, op. cit., § 2057.

[50] Constitution of the United States, Article III, § 2, Cl. 3; 18 U.S.C., § 2381.

[51] 18 U.S.C., § 1621.

[52] Constitution of the United States, Article III, § 2, Cl. 3.

[53] Weiler v. United States, 1945, 323 U.S. 606, 608-609; Wigmore, op. cit., §§ 2030-2044.

we take notice as plain error.[54] The judgment in this case was rendered on April 10, 1956, and the sentence imposed was the maximum of twenty years on Count I, which charged entering the bank with intent to commit larceny,[55] and the maximum of ten years on Count II, which charged the robbery of the bank of property of the total value of $30,000.[56] Since then the Supreme Court has held that the two subdivisions constitute but one offense and that the imposition of two sentences is illegal.[57]

The trial judge, by imposing the maximum sentence on Count I and allowing the sentence on Count II to run concurrently, indicated that he intended the maximum sentence to be twenty years. Thus the sentence imposed on Count II became merged in the sentence imposed on Count I. In these circumstances the policy to be followed is to vacate the lower sentence on the second count.[58] The fact that the sentences run concurrently and that, consequently, only twenty years would be served, should not stand in the way of such action because

> "it is well understood that a multiplicity of sentences impairs a prisoner's opportunities for pardon or parole."[59]

The Judgment will therefore be modified by striking therefrom the sentence imposed on Count II. As so modified the Judgment is affirmed.

(Endorsed:) Opinion. Filed Mar. 31, 1959.

Paul P. O'Brien, Clerk.

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[54]Rule 52(b), Federal Rules of Criminal Procedure. See cases cited in Note 43.

[55]18 U.S.C., § 2113(a).

[56]18 U.S.C., § 2113(b).

[57]Prince v. United States, 1957, 352 U.S. 322; Heflin v. United States, No. 137, Decided February 24, 1959.

[58]Remine v. United States, 6 Cir., 1947, 167 F. 2d 1020, 1021; Price v. United States, 6 Cir., 1951, 193 F. 2d 523, 524; United States v. De Canio, 2 Cir., 1957, 245 F. 2d 713, 717, which involved sentences under § 2113(a) and § 2113(d) of Title 18.

[59]Hibdon v. United States, 6 Cir., 1953, 204 F. 2d 834, 839.

United States Court of Appeals
for the Ninth Circuit

No. 15,929

James Henry Audett,
Appellant,
vs.
United States of America,
Appellee.

JUDGMENT

Appeal from the United States District Court for the District of Idaho, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the District of Idaho, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and hereby is modified by striking therefrom the sentence imposed on Count II (10 years). As so modified, the Judgment of the said District Court in this cause, be, and hereby is affirmed.

(ENDORSED) Judgment

Filed and entered: March 31, 1959
Paul P. O'Brien, Clerk

Title 18, § 2113

(a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or

Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used, any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; or

Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value not exceeding $100 belonging to, or in the care, custody, control, management, or possession

of any bank, or any savings and loan association, shall be fined not more than $1,000 or imprisoned not more than one year, or both.

(c) Whoever receives, possesses, conceals, stores, barters, sells, or disposes of, any property or money or other thing of value knowing the same to have been taken from a bank, or a savings and loan association, in violation of subsection (b) of this section shall be subject to the punishment provided by said subsection (b) for the taker.

(d) Whoever, in committing, or in attempting to commit, any offense defined in subsections (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

(e) Whoever, in committing any offense defined in this section, or in avoiding or attempting to avoid apprehension for the commission of such offense, or in freeing himself or attempting to free himself from arrest or confinement for such offense, kills any person, or forces any person to accompany him without the consent of such person, shall be imprisoned not less than ten years, or punished by death if the verdict of the jury shall so direct.

(f) As used in this section the term "bank" means any member bank of the Federal Reserve System, and any bank, banking association, trust company, savings bank, or other banking institution organized or operating under the laws of the United States.

and any bank the deposits of which are insured by the Federal Deposit Insurance Corporation.

(g) As used in this section the term "savings and loan association" means any Federal savings and loan association and any savings and loan association the accounts of which are insured by the Federal Savings and Loan Insurance Corporation. June 25, 1948, c. 645, 62 Stat. 796, amended Aug. 3, 1950, c. 516, 64 Stat. 394.

Title 28, § 604. Duties of Director generally

(a) The Director shall be the administrative officer of the courts, and under the supervision and direction of the Judicial Conference of the United States, shall:

(1) Supervise all administrative matters relating to the offices of clerks and other clerical and administrative personnel of the courts;

(6) Determine and pay necessary office expenses of courts, judges, and those court officials whose expenses are by law allowable, and the lawful fees of United States Commissioners;

(9) Purchase, exchange, transfer, distribute, and assign the custody of law books, equipment and supplies needed for the maintenance and operation of the courts and the Administrative Office and the offices of the United States Commissioners;

§ 605. Budget estimates

The Director, under the supervision of the Judicial Conference of the United States, shall submit to the Bureau of the Budget annual estimates of the ex-

penditures and appropriations necessary for the maintenance and operation of the courts and the Administrative Office, and such supplemental and deficiency estimates as may be required from time to time for the same purposes, according to law.

Such estimates shall be approved, before presentation to the Bureau of the Budget, by the Judicial Conference of the United States, except that estimates with respect to the Court of Customs and Patent Appeals, the Customs Court, and the Court of Claims shall be approved by such courts, respectively.

All such estimates shall be included in the budget without revision, but subject to the recommendations of the Bureau of the Budget, as provided by section 11 of Title 31 for the estimates of the Supreme Court.

§ 607. Practice of law prohibited

An officer or employee of the Administrative Office shall not engage directly or indirectly in the practice of law in any court of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 975

JAMES HENRY AUDETT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. i-xvii; R. 147-163) is reported at 265 F.2d 837.

JURISDICTION

The judgment of the court of appeals was entered on March 31, 1959 (R. 164). A petition for rehearing was denied on May 4, 1959 (R. 165). The petition for a writ of certiorari was filed on June 3, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether it was error to permit a United States Commissioner to act as co-defense counsel in representing one accused of committing a federal crime, where the accused waived any objection he might have in this respect through a written waiver addressed to the United States Attorney and a statement to such effect in open court.

2. Whether this Court should announce a new rule that one accused of committing a crime cannot be convicted on the uncorroborated testimony of purported accomplices, where the facts show corroboration of the testimony of the purported accomplices.

3. Whether the court below erred in sustaining petitioner's 20-year prison term for unlawful entry of a national bank, while striking petitioner's 10-year concurrent prison term for a completed larceny in the bank.

STATUTES INVOLVED

18 U.S.C. 2113 provides in pertinent part:

> (a) Whoever, by force and violence, or by intimidation, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, or any savings and loan association; or
>
> Whoever enters or attempts to enter any bank, or any savings and loan association, or any building used in whole or in part as a bank, or as a savings and loan association, with intent to commit in such bank, or in such savings and loan association, or building, or part thereof, so used,

any felony affecting such bank or such savings and loan association and in violation of any statute of the United States, or any larceny—

Shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

(b) Whoever takes and carries away, with intent to steal or purloin, any property or money or any other thing of value exceeding $100 belonging to, or in the care, custody, control, management, or possession of any bank, or any savings and loan association, shall be fined not more than $5,000 or imprisoned not more than ten years, or both; * * *

* * * *

28 U.S.C. 604 provides in pertinent part:

(a) The Director shall be the administrative officer of the courts, and under the supervision and direction of the Judicial Conference of the United States, shall:

* * * *

(6) Determine and pay necessary office expenses of courts, judges, and those court officials whose expenses are by law allowable, and the lawful fees of United States Commissioners;

(7) Regulate and pay * * * necessary travel and subsistence expenses incurred by judges, court officers and employees, and officers and employees of the Administrative Office, while absent from their official stations on official business;

* * * *

(9) Purchase, exchange, transfer, distribute, and assign the custody of law books, equipment and supplies needed for the maintenance and operation of the courts and the Administrative

Office and the offices of United States Commissioners;

* * * *

28 U.S.C. 607 provides:

> An officer or employee of the Administrative Office shall not engage directly or indirectly in the practice of law in any court of the United States.

28 U.S.C. (Supp. V) 633 provides in pertinent part:

> (c) United States commissioners who are required to devote full time to the performance of the duties of the office, as determined by the Director of the Administrative Office of the United States Courts under the supervision and direction of the Judicial Conference of the United States and who do not engage in the practice of the law, shall be allowed their actual and necessary office expenses, including the compensation of a necessary clerical assistant. Such office expense shall be determined and paid and such compensation shall be fixed and paid by the Director of the Administrative Office of the United States Courts under the provisions of section 604 of this title.

28 U.S.C. 955 provides:

> The clerk of each court and his deputies and assistants shall not practice law in any court of the United States.

STATEMENT

A two-count indictment charged the petitioner with entering a national bank with the intent to commit

larceny, and larceny of the bank's property in violation of 18 U.S.C. 2113(a) and (b) (R. 3-4). Two accomplices pleaded guilty to similar charges (R. 59, 90) and testified for the government. Following a trial by jury held in the United States District Court for the District of Idaho, petitioner was found guilty on both counts. He was sentenced to twenty years imprisonment on the entry count and ten years on the larceny count, the sentences to run concurrently (R. 15). The court of appeals modified the judgment by striking the sentence imposed on the larceny count and, as modified, affirmed it (R. 164).

The pertinent facts are as follows:

During the evening of October 28, 1953, following two unsuccessful attempts to burglarize two other banks (R. 45-46, 67-69, 77-78, 98), petitioner and two others gained access into the First National Bank of Cottonwood, Idaho. While inside, they carved a hole through the top of the bank vault, lowered themselves into the vault and began to rifle through the safe-deposit boxes (R. 50-51, 92-93). After several hours inside the bank, they left by boring a hole through the rear wall of the bank adjacent to a warehouse, and opened a door which led to an alley (R. 113). They took with them a quantity of gold dust, jewelry, gold in vials, and approximately $27,000.00 worth of currency, which was divided among the petitioner and the two others (R. 55, 86-87, 103-105).

The tools used inside the bank, along with the rope hanging from the skylight through which the initial access of one accomplice was gained, were left inside the bank (R. 54, 95-96). The accomplices identified

these implements either as their own or similar to those used inside the bank (R. 56-59, 105-106).

Mr. Dean E. Miller, one of the two defense attorneys for the petitioner at his trial, was also serving as a United States Commissioner at that time (R. 37). Petitioner, in a letter written by one of his attorneys to the United States Attorney, as well as in open court, waived any question as to the appearance of Mr. Miller as his counsel (R. 9, 37).

In the instructions to the jury, the judge charged that the testimony of an accomplice is to be received with caution and weighed with great care, and that "while it is true that a jury may convict on such testimony alone, yet the jury should not rely on it unsupported for a conviction, unless it produces in their minds a positive conviction of its truth" (R. 139).

ARGUMENT

1. Petitioner contends that, notwithstanding his earlier waivers, he was denied proper representation by counsel, since one of his defense counsel was also serving as a United States Commissioner. Petitioner points to the fact that 28 U.S.C. 604 provides that the Director of the Administrative Office of the United States Courts pay the expenses of courts and commissioners, and that the provisions of the United States Code relating to the United States Commissioners are found in Part III of the Code entitled "Court Officers and Employees". On this basis, he argues that the United States Commissioners are within the proscription of 28 U.S.C. 607, which prohibits officers and employees of the Administra-

tive Office from the direct or indirect practice of law. These contentions are devoid of merit.

Part III of the Judicial Code contains nine chapters, with separate chapters for the Administrative Office of the United States Courts, the United States Commissioners, and court employees generally. The ban on the practice of law in 28 U.S.C. 607, which is included in Chapter 41 entitled "Administrative Office of United States Courts", applies only to officers or employees in the Administrative Office. Indeed 28 U.S.C. 607 expressly so states. That Section 607 was not intended to apply to all types of employees covered by Part III is shown by the fact that there is specific provision against the practice of law by court employees in Chapter 57, 28 U.S.C. 955. Congress was obviously aware that some United States Commissioners practice law outside of their official duties, and impliedly sanctioned the practice since 28 U.S.C. 633(c) provides for the necessary and actual office expenses of full time United States Commissioners "who do not engage in the practice of the law". See H. Rep. No. 1360, 83d Cong., 2d Sess.[1] If

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[1] "A Commissioner pays out of the earned fees his expenses for clerical help, telephone, office supplies, and rent, if he is not situated in a Federal building.

"There are about 650 Commissioners throughout the country, most of whom serve part time because of little business, but in the large metropolitan areas the volume is so great as to require full-time attendance, which results in increased expenses.

"Under the proposed bill a full-time Commissioner who does not practice law would be permitted to receive the actual and necessary office expenses he incurs including the cost of a clerical assistant." * * * H. Rep. No. 1360, 83d Cong., 2d Sess., p. 2.

United States Commissioners were prohibited from the outside practice of law, the provision in the statute, "and who do not engage in the practice of the law," would have no meaning. 28 U.S.C. 633(c).[2]

Furthermore, petitioner has no standing to complain of the dual capacity of his co-defense counsel in view of his written and oral waiver in open court, both of which are set out verbatim by the court below (R. 152-154). This Court has indicated that it would uphold waivers of rights more pervasive and fundamental than the mere possibility of an unconscious conflict of interest here involved. See *Schick* v. *United States*, 195 U.S. 65, 72; *Johnson* v. *Zerbst*, 304 U.S. 458, 465, 467-468. Since the petitioner was represented by counsel in addition to Mr. Miller at the time the waivers were made, and since the petitioner does not mention, let alone argue, that he did not understand the nature of his waiver, a competent and intelligent waiver of objection to Mr. Miller's dual role was made. *Johnson* v. *Zerbst*, *supra*, at 465, 468.

2. Petitioner contends that this Court should establish the rule that a conviction cannot be sustained on the uncorroborated testimony of accomplices. This

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[2] There is no merit in the petitioner's contention that the United States Commissioners are officers or employees of the Administrative Office of the United States Courts because the Director of the Administrative Office exercises some control over the fees, acquisition and distribution of law books, supplies and equipment for the United States Commissioners. The same reasoning would make judges of the various United States courts officers or employees of the Administrative Office, for the Administrative Office pays the office expenses of the judges and the costs of their books and equipment. 28 U.S.C. 604(a) (6) (7) (9).

contention runs counter to the federal rule which does not require such corroboration. *Poliafico* v. *United States*, 237 F. 2d 97, 115 (C.A. 6), certiorari denied, 352 U.S. 1025; *Johns* v. *United States*, 227 F. 2d 374, 375 (C.A. 10); *Duke* v. *United States*, 255 F. 2d 721, 729 (C.A. 9), certiorari denied, 357 U.S. 920; *McClanahan* v. *United States*, 230 F. 2d 919, 922 (C.A. 5), certiorari denied, 352 U.S. 824; *Benedicto Lebrón* v. *United States*, 241 F. 2d 885, 887 (C.A. 1), certiorari denied, 354 U.S. 911. See *Caminetti* v. *United States*, 242 U.S. 470, 495. The trial judge instructed the jury that they could convict the petitioner on the evidence of the accomplices alone, but that such evidence was to be received and examined with care (R. 139). In so instructing the jury, the trial judge followed the practice approved by this Court. *Holmgren* v. *United States*, 217 U.S. 509, 523-524; *Caminetti* v. *United States*, *supra*, at 495.

Moreover, although the evidence linking the petitioner with the offense was supplied solely by the two accomplices, the testimony of the accomplices respecting the attempted burglary in Colton, Washington, the burglary of the Cottonwood bank, together with the manner of entry, articles removed, tools used, etc., was corroborated by other testimony (R. 112-113, 118-120, 130-131). As there is substantial evidence to support the verdict, the petitioner has no cause for complaint. *Caminetti* v. *United States*, *supra*, at 495-496; *Glasser* v. *United States*, 315 U.S. 60, 80.

3. Petitioner contends that his sentence should be imposed on Count II (for violation of 18 U.S.C. 2113

(b)), charging the larceny which carries a 10-year maximum imprisonment sentence, and not on Count I (for violation of 18 U.S.C. 2113(a)), charging the unlawful entry which carries a maximum of 20-years' imprisonment. The precise question presented here—whether a court may impose sentence within the maximum permissible for entry into a bank with intent to commit a felony, where the entry is followed by a completed larceny—was twice before this Court on petitions for writs of certiorari to review the judgments, in accord with that below, of the Fifth Circuit in *United States* v. *Williamson*, 255 F. 2d 512, certiorari denied, 358 U.S. 941 (No. 313 Misc., this Term) and of the Tenth Circuit in *Purdom* v. *United States*, 249 F. 2d 822, certiorari denied, 355 U.S. 913 (No. 603, O.T. 1957). We respectfully refer the Court to the government's briefs in opposition in those cases. The Eighth Circuit has also ruled in accordance with the decision below. *Kitts* v. *United States*, 243 F. 2d 883; *La Duke* v. *United States*, 253 F. 2d 387. There is no conflict of circuits on this issue.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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